No. _____

IN THE
Supreme Court of the United States

JOSEPH RODI,

Petitioner,

V.

SOUTHERN NEW ENGLAND SCHOOL OF LAW, et al.,

Respondent.

On the Petiton for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI SUBMITTED OCTOBER 14, 2008

Joseph Rodi
-Pro se
675 Woodland Avenue
Cherry Hill, NJ 08002
856-662-6177

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JOSEPH RODI, Plaintiff, Appellant, v. SOUTHERN NEW ENGLAND SCHOOL OF LAW ET AL., Defendants, Appellees.

No. 03-2502

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

389 F.3d 5; 2004 U.S. App. LEXIS 23486

November 10, 2004, Decided

SUBSEQUENT HISTORY: As Amended, November 18, 2004

PRIOR HISTORY: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. [Hon. Nancy Gertner, U.S. District Judge].
Rodi v. S. New Eng. Sch. of Law, 255 F. Supp. 2d 346, 2003 U.S. Dist. LEXIS 5869 (D.N.J., 2003)

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CASE SUMMARY
PROCEDURAL POSTURE: Plaintiff graduate sued defendants, a law school, a dean, and an acting dean, alleging fraudulent misrepresentation and a

violation of the Massachusetts Consumer Protection Act (MCPA), Mass. Gen. Laws ch. 93A, §§ 1-11. The United States District Court for the District of Massachusetts granted defendants' motion to dismiss. The graduate appealed.

OVERVIEW: The graduate alleged that letters from the dean and acting dean containing misrepresentations regarding future accreditation induced him to enroll at the unaccredited law school and to stay at the law school after accreditation was denied. The court determined that dismissal of the fraudulent misrepresentation claim was not warranted, because (1) the graduate sufficiently alleged a fraudulent misrepresentation claim based upon the false statements, (2) the statement that the law school was "highly confident" of accreditation could have been actionably misleading, (3) under Fed. R. Civ. P. 9(b), the letters were sufficiently specific as to speaker, content, context, and time, (4) the accreditation disclaimer in the law school's catalogue did not render the graduate's reliance unreasonable, and (5) the claim was not time-barred under Mass. Gen. Laws ch. 260, § 2A, because the savings statute, Mass. Gen. Laws ch. 260, § 32, applied based upon an antecedent suit that was dismissed. However, the court dismissed the consumer protection claim because the graduate failed to allege compliance with the notification requirement of the MCPA.

OUTCOME: The appellate court reversed the district court's order insofar as it dismissed the fraudulent misrepresentation count. The appellate

court affirmed the district court's order insofar as it dismissed the consumer protection count, but directed that the graduate be afforded leave to amend that count.

CORE TERMS: accreditation, fraudulent misrepresentation, misrepresentation, fraudulent, disclaimer, misrepresentation claim, savings, actionable, pro se, law school, order of dismissal, statute of limitations, leave to amend, affirmative defenses, particularity, catalogue, pessimism, diversity, enrolled, pleaded, dean, actionable claim, inter alia, statements of opinion, matter of form, summary judgment, judicial notice, notice requirement, personal jurisdiction, prerequisite

LEXISNEXIS® HEADNOTES - Hide

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 In an appeal from an order under Fed. R. Civ. P. 12(b)(6), the appellate court takes the facts as they are alleged in the plaintiff's complaint. The appellate court ignores, however, bald assertions, periphrastic circumlocutions,

unsubstantiated conclusions, and outright vituperation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN2 The Civil Rules provide that when matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56. Fed. R. Civ. P. 12(b). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 Orders granting motions to dismiss under Fed. R. Civ. P. 12(b)(6) engender de novo review. In ruling on whether a plaintiff has stated an actionable claim, an inquiring court, be it a trial or appellate court, must consider the complaint, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Evidence > Judicial Notice > General Overview

HN1 The jurisprudence of Fed. R. Civ. P. 12(b)(6) permits courts to consider matters that are susceptible to judicial notice. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Affirmative Defenses

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

HN5 As a general rule, a properly raised affirmative defense can be adjudicated on a motion to dismiss so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Civil Procedure > Parties > Self-Representation > Pleading Standards

HN6 The appellate court will uphold a dismissal on the ground of the vitality of the claim as a whole only if the plaintiff's factual averments hold out no hope of recovery on any theory adumbrated in his complaint. The appellate court's task is not to decide whether the plaintiff ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim. In this

process, the fact that the plaintiff filed the complaint pro se militates in favor of a liberal reading. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

HN7 Sitting in diversity, the court looks to the substantive law of the forum state to guide its analysis. More Like This Headnote | *Shepardize:* Restrict By Headnote

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN8 Under Massachusetts law, a claim for misrepresentation entails a false statement of material fact made to induce the plaintiff to act and reasonably relied upon by him to his detriment. More Like This Headnote | *Shepardize:* Restrict By Headnote

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN9 In the context of fraudulent misrepresentation, a statement, though couched in terms of opinion, may constitute a statement of fact if it may reasonably be

understood by the reader or listener as implying the existence of facts that justify the statement (or, at least, the non-existence of any facts incompatible with it). More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN10 For the most part, a civil complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). For that reason, great specificity is ordinarily not required to survive a Fed. R. Civ. P. 12(b)(6) motion. That proposition, however, is not universally applicable. Cases alleging fraud--and misrepresentation is considered a species of fraud--constitute an exception to it. That exception, codified in Fed. R. Civ. P. 9(b), requires that fraud be alleged with particularity. This heightened pleading standard is satisfied by an averment of the who, what, where, and when of the allegedly false or fraudulent representation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN11 The specificity requirement extends only to the particulars of the allegedly misleading statement itself. The other elements of fraud, such as intent and knowledge, may be averred in general terms. Fed. R. Civ. P. 9(b). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN12 When a claim sounding in fraud contains a hybrid of allegations, some of which satisfy the strictures of Fed. R. Civ. P. 9(b) and some of which do not, an inquiring court may sustain the claim on the basis of those specific allegations that are properly pleaded. More Like This Headnote | *Shepardize:* Restrict By Headnote

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN13 Reasonable reliance is an element of a

fraudulent misrepresentation claim under Massachusetts law. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN11 In the context of fraudulent misrepresentation under Massachusetts law, the reasonableness of a party's reliance ordinarily constitutes a question of fact for the jury. When, however, the facts alleged in the complaint preclude a finding of reasonable reliance, a court may enter an order of dismissal under Fed. R. Civ. P. 12(b)(6). More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN12 A contracting party may recover for fraud notwithstanding specific disclaimers that do not cover the allegedly fraudulent contract-inducing representations. More Like This

Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN16 Under Massachusetts law, a party may not contract out of fraud. With this in mind, Massachusetts courts consistently have held that disclaimers do not automatically defeat fraudulent misrepresentation claims. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Governments > Legislation > Statutes of Limitations > Pleading & Proof

HN17 To a limited extent, a statute of limitations defense can be considered on a Fed. R. Civ. P. 12(b)(6) motion. The key is whether the complaint and any documents that properly may be read in conjunction with it show beyond doubt that the claim asserted is out

of time. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Statutes of Limitations > Time Limitations

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Procedure > Statutes of Limitations > General Overview

HN18 Massachusetts law provides that an action in tort--of which fraudulent misrepresentation is a species--shall be commenced only within three years next after the cause of action accrues. Mass. Gen. Laws ch. 260, § 2A. A claim for fraudulent misrepresentation does not begin to accrue until a plaintiff learns or reasonably should have learned of the misrepresentation. In this context, courts sometimes ask when sufficient indicia of trouble--storm warnings, so to speak--should have been apparent to a reasonably prudent person. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Jurisdiction > General Overview

Governments > Legislation > Statutes of Limitations > Time Limitations

Governments > Legislation > Statutes of Limitations > Tolling

HN19 Under Massachusetts law, if an action is duly commenced within the limitations period and then dismissed for "any matter of form," the plaintiff is entitled to commence a new action for the same cause within one year after the dismissal. Mass. Gen. Laws ch. 260, § 32. The savings statute applies, inter alia, to an action originally filed and dismissed in a court of another state or in a federal district court. The United States Court of Appeals for the First Circuit has no doubt that, for purposes of this savings statute, dismissals for want of personal jurisdiction are appropriately classified as dismissals arising out of matters of form. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

Governments > Legislation > Statutes of Limitations > General Overview

HN20 A court asked to dismiss a complaint on statute of limitations grounds may examine not only the complaint but also such other documents as may appropriately be considered under Fed. R. Civ. P. 12(b)(6). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

HN21 In a diversity case, procedure, unlike substance, is governed by federal law. Federal courts sitting in diversity apply state substantive law and federal procedural rules. More Like This Headnote | *Shepardize:* Restrict By Headnote

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

HN22 Before bringing suit under that the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, §§ 1-11, a plaintiff must mail to the defendant a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon. Mass. Gen. Laws ch. 93A, § 9(3). This notification must be furnished no fewer than thirty days prior to the filing of suit. Mass. Gen. Laws ch. 93A, § 9(3). The statutory notice requirement is not merely a procedural nicety, but, rather, a prerequisite to suit. Furthermore, as a special element of the cause of action, it must be alleged in the plaintiff's complaint. More Like This Headnote | *Shepardize:* Restrict By Headnote

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

HN23 The notice requirement is a prerequisite to an action under Mass. Gen. Laws ch. 93A, § 9, but nothing in the statute makes it a prerequisite to any other remedy available to aggrieved consumers. More Like This Headnote

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

HN21 A failure to allege compliance with the statutory notice requirement is not necessarily a death knell for a Mass. Gen. Laws ch. 93A claim. Massachusetts courts typically have allowed plaintiffs to amend in order to cure this kind of modest pleading defect. Federal practice is no less permissive. Fed. R. Civ. P. 15(a). Fed. R. Civ. P. 15(a) states that leave to amend shall be freely given when justice so requires. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Parties > Self-Representation > Pleading Standards

HN25 Courts should endeavor, within reasonable limits, to guard against the loss of pro se claims due to technical defects. More Like This Headnote | *Shepardize:* Restrict By Headnote

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN26 A fraudulent misrepresentation, actionable at common law, often can form the basis for a Mass. Gen. Laws ch. 93A claim. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Fredric J. Gross and Fredric J. Gross Law Firm on brief for appellant.

Allen N. David, Elizabeth A. Houlding and Peabody & Arnold LLP on brief for appellees.

JUDGES: Before Torruella, Selya and Howard, Circuit Judges.

OPINION BY: SELYA

OPINION

[*9] SELYA, Circuit Judge. This is an appeal from a terse order dismissing a nine-count civil complaint for failure to state a claim upon which relief might be granted. Because it is impossible to tell what arguments the district court found persuasive, we have canvassed the field. We conclude

that the complaint states one potentially actionable claim and another that is not beyond hope of repair. Consequently, we reverse the order of dismissal in part and remand for further proceedings.

I. BACKGROUND

Because this is HN1 an appeal from an order under Fed. R. Civ. P. 12(b)(6), we take the facts as they are alleged in the plaintiff's complaint. [1] SEC v. SG Ltd., 265 F.3d 42, 44 **[*10]** (1st Cir. 2001); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998). **[**2]** We ignore, however, "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, [and] outright vituperation." Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). Once the scene is set, we recount the travel of the case.

FOOTNOTES

1 Although the parties submitted affidavits in the district court, we eschew any reliance on the factual averments contained therein, with a few exceptions that we elucidate below. We explain why in Part II(A), infra.

A. The Facts.

In July of 1997, plaintiff-appellant Joseph Rodi, a would-be law student who resided in New Jersey,

received a recruitment letter from Francis J. Larkin, dean of Southern New England School of Law (SNESL). The letter stated in pertinent part that the accreditation committee of the American Bar Association (ABA) had voted to recommend SNESL for "provisional accreditation," a status that would be granted upon ratification of the recommendation by two other ABA bodies. The letter also stated that SNESL **[**3]** was "highly confident" of receiving the needed ratifications and that the future of the school "has never been brighter." Because the plaintiff intended to take the New Jersey bar examination, the prospect of accreditation was critically important to him; New Jersey requires bar applicants to hold law degrees from ABA-accredited institutions.

Larkin's letter ended with a pitch for enrollment. The solicitation bore fruit; the plaintiff enrolled at SNESL that month. He received a catalogue from SNESL containing, inter alia, a statement (in the same type size and font as the surrounding text) to the effect that: "The Law School makes no representation to any applicant or student that it will be approved by the American Bar Association prior to the graduation of any matriculating student." The complaint alleges that, despite the cheery optimism of Larkin's letter, the dean knew full well that SNESL had identifiable deficiencies that would almost certainly preclude ABA accreditation.

The ABA denied SNESL's application for accreditation in September of 1997. As a result, the plaintiff considered transferring to an accredited law

school for his second year of study. Word of his ambivalence [**4] reached the dean's office. David M. Prentiss, who was then the acting dean, wrote to the plaintiff in order to "make sure" that he was "fully informed of the school's current status regarding ABA accreditation." That communique stated in substance that the school had improved the four areas found deficient by the ABA and that there should be "no cause for pessimism" about the school achieving accreditation before the plaintiff's forecasted graduation date.

In reliance on these and other representations -- all of which the complaint says were knowingly false -- the plaintiff remained at SNESL. He came to regret the choice: according to the complaint, SNESL knew, but elected not to disclose, that the ABA was highly critical of SNESL; that any faint hope of attaining accreditation depended upon a complete overhaul of the faculty, administration, curriculum, and student body; and that the level of non-compliance made the prospect of SNESL's near-term accreditation remote. To compound this mendacity, the school frustrated students' attempts to learn about the true status of the accreditation pavane.

In November of 1999 -- during the plaintiff's third year of legal studies -- the ABA denied [**5] SNESL's renewed application for accreditation. SNESL failed to appeal to the ABA's House of Delegates as it previously had promised. Instead, the school cashiered half of its full-time faculty, thereby straying even further from ABA-mandated standards.

[*11] The plaintiff completed his studies in June of 2000. SNESL remained unaccredited. Notwithstanding his diploma, the plaintiff has not been able to sit for the New Jersey bar examination.

B. Travel of the Case.

On July 18, 2002, the plaintiff sued SNESL, Larkin, and Prentiss in the United States District Court for the District of New Jersey. The district court dismissed that action for want of in personam jurisdiction on April 10, 2003. Rodi v. S. New Eng. Sch. of Law, 255 F. Supp. 2d 346, 351 (D.N.J. 2003). On June 9, 2003, the plaintiff, acting pro se, sued the same defendants in the United States District Court for the District of Massachusetts. Grounding jurisdiction in diversity of citizenship and the existence of a controversy in the requisite amount, 28 U.S.C. § 1332(a), his complaint incorporated copies of the Larkin and Prentiss letters and limned nine statements of claim.

[**6] We confine our discussion to the two claims that the plaintiff presses on appeal: (i) that the defendants' statements constituted actionable fraud or misrepresentation, and (ii) that SNESL's actions violated a consumer protection statute, Mass. Gen. Laws ch. 93A, §§ 1-11. The defendants filed a timely motion to dismiss, positing that the complaint, for a variety of reasons, failed to state a claim upon which relief could be granted. As to the fraudulent misrepresentation count, the defendants asseverated that the "misrepresentations" were non-actionable

statements of opinion; that the supposed fraud had not been alleged with the requisite particularity; that, in all events, the plaintiff's professed reliance on those statements was unreasonable; and that the statute of limitations had run. With respect to the Chapter 93A count, the defendants averred that the complaint failed to state an actionable claim because the alleged misrepresentations were insufficient to trigger the prophylaxis of the statute, and, moreover, the complaint failed to allege that a demand letter had been sent before suit. See Mass. Gen. Laws ch. 93A, § 9(3).

The plaintiff, still **[**7]** acting pro se, filed an opposition to the motion to dismiss in which he made a point-by-point rebuttal of the defendants' asseverations. As part of his opposition, he tendered five affidavits, two additional letters, and an array of other documents. SNESL filed a reply and, not to be outdone, proffered a welter of documents (including copies of its catalogues for the years in question).

The district court abjured oral argument and ruled on the papers. It entered a cryptic order, providing in its entirety that the motion to dismiss should be allowed "for substantially the reasons outlined in defendants' memorandum of law." The plaintiff promptly moved for reconsideration, suggesting, among other things, that if the district court "found the complaint's allegations too scanty, it could have granted leave to amend." The court denied the motion without comment. This counseled appeal ensued.

II. DISCUSSION

We divide our discussion of the issues into several segments. First, we ascertain what materials are properly before us. We then proceed count by count and theory by theory. In so doing, we omit any reference to the seven counts that the plaintiff has elected not to defend **[**8]** on appeal.

A. Configuring the Record.

The threshold issue here involves a determination of what legal standard the district court applied (or should have applied) in examining the pleadings before it. **[*12]** The defendants styled their motion as a motion to dismiss, but the parties then proffered exhibits containing information extraneous to the complaint. That presents a quandary.

HN2 The Civil Rules provide that when "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 12(b). The district court's order is silent as to whether it elected to convert the motion to a motion for summary judgment. Consequently, we must decide "whether the court actually took cognizance of [the supplemental material], or invoked Rule 56, in arriving at its decision." Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, 958 F.2d 15, 19 (1st Cir. 1992).

The state of this record is tenebrous. We do know, however, that the district court embraced the

defendants' memorandum of law -- and that memorandum relied upon the **[**9]** Rule 12(b)(6) standard, not the quite different Rule 56 standard. In the same vein, both sides have briefed the case on appeal as if Rule 12(b)(6), rather than Rule 56, controls. Under the unique circumstances of this case, considerations of fundamental fairness counsel in favor of following the parties' and the lower court's lead and testing the arguments on appeal under the jurisprudence of Rule 12(b)(6). We adopt that course.

Once that decision has been made, the standard of review becomes straightforward. HN3 Orders granting motions to dismiss under Rule 12(b)(6) engender de novo review. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 40 (1st Cir. 1998). In ruling on whether a plaintiff has stated an actionable claim, an inquiring court, be it a trial or appellate court, must consider the complaint, documents annexed to it, and other materials fairly incorporated within it. In re Colonial Mortg. Bankers Corp., 324 F.3d 12, 15-16 (1st Cir. 2003); Cogan v. Phoenix Life Ins. Co., 310 F.3d 238, 241 n.4 (1st Cir. 2002). This sometimes includes documents referred to in the complaint but not annexed to it. See **[**10]** Coyne v. Cronin, 386 F.3d 280, 2004 U.S. App. LEXIS 21178, (1st Cir. 2004); Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988). Finally, HN4 the jurisprudence of Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice. Colonial Mortg. Bankers, 324 F.3d at 15-16; Boateng v. InterAmerican Univ., 210 F.3d 56, 60 (1st Cir. 2000).

Giving force to these principles, we may consider on this appeal the facts alleged in the complaint, the Larkin and Prentiss letters (which were annexed to it), and any matters that may be judicially noticed. We also may consider SNESL's 1997-1998 catalogue, alleged by the plaintiff to comprise a part of the contract between the parties, as a document fairly incorporated into the complaint. See Beddall, 137 F.3d at 17. However, we may not consider at this stage the array of affidavits and miscellaneous documents proffered by the parties.

Having identified the materials that are properly before us, we briefly address the question of affirmative defenses. On a **[**11]** Rule 12(b)(6) motion, the court's inquiry sometimes may encompass affirmative defenses. Everything depends on the record. [11] As a general rule, a properly raised affirmative defense can be adjudicated on a motion to dismiss so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude. Colonial Mortg. Bankers, 324 F.3d at 16.

[*13] Against this backdrop, we examine the bases on which the district court could have predicated its decision. We take each count and each ground in turn.

B. The Fraudulent Misrepresentation Count.

The defendants advance a motley of potential defenses to the plaintiff's fraudulent misrepresentation claim. We address them sequentially.

1. In General. We start by testing the vitality of the claim as a whole. HN6 We will uphold a dismissal on this ground "only if the plaintiff's factual averments hold out no hope of recovery on any theory adumbrated in [his] complaint." Id. at 15 (citing Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999)). **[**12]** Our task is not to decide whether the plaintiff ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim. Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). In this process, the fact that the plaintiff filed the complaint pro se militates in favor of a liberal reading. See Boivin v. Black, 225 F.3d 36, 43 (1st Cir. 2000) (explaining that "courts hold pro se pleadings to less demanding standards than those drafted by lawyers").

HN7 Sitting in diversity, we look to the substantive law of the forum state (here, Massachusetts) to guide our analysis. Correia v. Fitzgerald, 354 F.3d 47, 53 (1st Cir. 2003). HN8 Under Massachusetts law, a claim for misrepresentation entails a false statement of material fact made to induce the plaintiff to act and reasonably relied upon by him to his detriment. Zimmerman v. Kent, 31 Mass. App. Ct. 72, 575 N.E.2d 70, 74 (Mass. App. Ct. 1991). The plaintiff's claim passes this screen.

As to Larkin, the complaint, read liberally, alleges the following: (i) Larkin knew that the plaintiff was a New Jersey resident who wanted to **[**13]** practice law there; (ii) he also knew that the plaintiff could not sit for the New Jersey bar unless he graduated from an accredited law school; (iii) he sent a letter to the plaintiff in New Jersey stating that SNESL was "highly confident" of receiving accreditation, knowing that this statement was materially false because SNESL had substantial deficiencies that would make accreditation difficult if not impossible; and (iv) the plaintiff, relying on Larkin's letter, enrolled at SNESL, paid substantial sums for tuition, and invested three years of his life in mastering its curriculum. We think that these allegations, if proven, would make out a viable claim for fraudulent misrepresentation. See Kerr v. Shurtleff, 218 Mass. 167, 105 N.E. 871, 872 (Mass. 1914) (holding that college committed fraudulent misrepresentation by falsely telling prospective student that it could "make [him] a D.M.D." when student enrolled and graduated but school lacked the authority to grant the degree).

A similar analysis applies to the plaintiff's fraudulent misrepresentation claim against Prentiss. Prentiss's statement that there was "no cause for pessimism" about the prospect of near-term **[**14]** accreditation is materially false if there was in fact cause for pessimism due to the extent of the school's known shortcomings. The plaintiff alleges that Prentiss knowingly made this false statement in order to induce him to remain enrolled at SNESL and that he (Rodi) took the bait and relied on it to his

detriment.

As pleaded, SNESL is vicariously liable for these fraudulent misrepresentations. It is reasonable to infer from the allegations contained in the complaint that Larkin and Prentiss were high-ranking employees of SNESL acting within the scope of their employment. Consequently, **[*14]** their misrepresentations are attributable to SNESL on respondeat superior grounds. See generally Kavanagh v. Trs. of Boston Univ., 440 Mass. 195, 795 N.E.2d 1170, 1174 (Mass. 2003) (citing Restatement (Third) of Agency § 2.04 (Tent. Draft No. 2, 2001)). Accordingly, the complaint, on its face, states a claim for fraudulent misrepresentation against all three defendants.

2. Matters of Opinion. The defendants' effort to short-circuit this claim is multifaceted. Their first counter is that the cited statements were, at most, statements of opinion. That is true, in a sense, **[**15]** but it does not get the defendants very far.

HN7 A statement, though couched in terms of opinion, may constitute a statement of fact if it may reasonably be understood by the reader or listener as implying the existence of facts that justify the statement (or, at least, the non-existence of any facts incompatible with it). See McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573, 650 N.E.2d 93, 96 (Mass. App. Ct. 1995); *see also* Restatement (Second) of Torts § 539 (1977) (explaining that "[a] statement of opinion as to facts not disclosed [may] be interpreted . . . as an implied statement that the

facts known to the maker are not incompatible with his opinion"); cf. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997) ("A statement couched as an opinion that presents or implies the existence of facts which are capable of being proven true or false can be actionable."). Thus, it is an actionable misrepresentation for a corporation falsely to tell investors that a specific project is "a great success" that is "proceeding smoothly . . . and better than expected" in order to keep **[**16]** them from pulling the plug. Stolzoff v. Waste Sys. Int'l, Inc., 58 Mass. App. Ct. 747, 792 N.E.2d 1031, 1036-37, 1042 (Mass. App. Ct. 2003). Similarly, it is an actionable misrepresentation for a car dealer to tell a buyer that he "believes" a vehicle is in "good" condition when he knows that it has significant mechanical defects. Briggs v. Carol Cars, Inc., 407 Mass. 391, 553 N.E.2d 930, 933 (Mass. 1990).

The Restatement, favorably referenced in the Massachusetts cases, gives a stunningly appropriate example:

When an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion. The opinion thus becomes in effect a short summary of those facts. When he is reasonably understood as conveying such a statement, he is subject to liability if he . . . has not found facts that justify the opinion, or the basis of his misrepresentation of the implied facts.

Restatement (Second) of Torts § 539, cmt. b **[**17]** . The parallel is apparent. The plaintiff's complaint alleges that the ABA has formulated certain objective criteria that inform its decisions about whether and when to accredit law schools. It also alleges that Larkin, knowing of these criteria, wrote a letter to the plaintiff implying that the school was reasonably capable of satisfying them. If Larkin did know of disqualifying and probably irremediable deficiencies (as the plaintiff has alleged), his statement that SNESL was "highly confident" of accreditation was actionably misleading. Prentiss's statement that there was "no cause for pessimism" about the fate of the school's renewed accreditation application is subject to much the same analysis.

To be sure, knowing falsity is much easier to allege than to prove. Here, however, the district court jettisoned the fraudulent misrepresentation count at the pleading stage. Given the liberal standards of Rule 12(b)(6), **[*15]** that dismissal cannot rest on the "opinion" defense.

3. Failure to Plead With Particularity. HN10 For the most part, a civil complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) **[**18]** . For that reason, "great specificity is ordinarily not required to survive a Rule 12(b)(6) motion." Garita Hotel, 958 F.2d at 17. That proposition, however, is not universally applicable. "Cases alleging fraud -- and for this purpose, misrepresentation is considered a species of fraud -- constitute an exception to [it]." Alternative Sys.

Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004). That exception, codified in Fed. R. Civ. P. 9(b), requires that fraud be alleged with particularity. Id. This heightened pleading standard is satisfied by an averment "of the who, what, where, and when of the allegedly false or fraudulent representation." Id.; accord Powers v. Boston Cooper Corp., 926 F.2d 109, 111 (1st Cir. 1991); McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228-29 & n.2 (1st Cir. 1980) .

In this instance, the defendants assert that the district court was warranted in dismissing the fraudulent misrepresentation claim for failure to abide by these strictures. In addressing that assertion, we note that HN11[↑] the specificity requirement extends only to **[**19]** the particulars of the allegedly misleading statement itself. See Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004). The other elements of fraud, such as intent and knowledge, may be averred in general terms. See Fed. R. Civ. P. 9(b).

After careful perscrutation, we deem this line of defense unavailing. The Larkin and Preutiss letters are unarguably specific as to speaker, content, context, and time. These statements are sufficient to shield the fraudulent misrepresentation count from dismissal at the pleading stage. See, e.g., Powers, 926 F.2d at 111; see also Philippe v. Shape, Inc., 688 F. Supp. 783, 786-87 (D. Me. 1988) (holding that documents affixed to complaint that contained alleged misrepresentations satisfied Rule 9(b)).

We note, however, that the complaint attributes a gallimaufry of other substantially similar statements to the defendants. We count no fewer than four such allegedly fraudulent misrepresentations: (i) that a SNESL employee had reported that the 1997 application for accreditation came "within an inch of ABA approval"; (ii) **[**20]** that an admissions officer proclaimed that SNESL "will be accredited"; (iii) that SNESL claimed it had received a special time waiver from the ABA because its "case [for accreditation] was so strong"; and (iv) that if accreditation were again denied, SNESL would appeal directly to the ABA's governing body. None of these four statements is pleaded with the particularity required under Rule 9(b). Insofar as we can tell from the complaint, each such statement was made by an unidentified person at an unnamed place and at an unspecified time. [2] Such gossamer allegations are patently inadequate under Rule 9(b). See Alternative Sys. Concepts, 374 F.3d at 30; Ahmed v. Rosenblatt, 118 F.3d 886, 889 (1st Cir. 1997).

FOOTNOTES

2 We acknowledge that the plaintiff has provided many of the missing details concerning these statements in other filings, such as his affidavits and briefs. Nevertheless, those documents are not eligible for consideration on this appeal. See supra Part II(A).

HN12[↑] When **[**21]** a claim sounding in fraud contains a hybrid of allegations, some of which satisfy the strictures of Rule 9(b) and some of which do not, an inquiring court may sustain the claim on the basis of **[*16]** those specific allegations that are properly pleaded. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003); Serabian v. Amoskeag Bank Shares, Inc., 24 F.3d 357, 366 (1st Cir. 1994). So it is here. For that reason, we take no view either as to whether the plaintiff, on remand, should be permitted to amend his complaint to add particulars anent the other four statements or as to whether, absent an amendment, evidence of those statements may be introduced at trial in support of the allegation that the plaintiff reasonably relied on the Larkin and Prentiss letters. In the first instance, such matters, should they arise, are for the district court.

4. Reasonable Reliance. HN13[↑] Reasonable reliance is, of course, an element of a fraudulent misrepresentation claim under Massachusetts law. Zimmerman, 575 N.E.2d at 76. The defendants strive to persuade us that the disclaimer placed in the school's catalogue -- disclaiming any "representation **[**22]** to any applicant or student that [SNESL] will be approved by the American Bar Association prior to the graduation of any matriculating student" -- renders any reliance by the plaintiff on Larkin's and Prentiss's epistles unreasonable as a matter of law. We are not convinced.

HN14[↑] **[*17]** Under Massachusetts law, the

reasonableness of a party's reliance ordinarily constitutes a question of fact for the jury. Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 242 (D. Mass. 1999); Cataldo Ambul. Serv., Inc. v. City of Chelsea, 426 Mass. 383, 688 N.E.2d 959, 962 (Mass. 1998). When, however, the facts alleged in the complaint preclude a finding of reasonable reliance, a court may enter an order of dismissal under Rule 12(b)(6). See, e.g., Mass. Laborers' Health & Welfare Fund, 62 F. Supp. 2d at 242; Saxon Theatre Corp. v. Sage, 347 Mass. 662, 200 N.E.2d 241, 244 (Mass. 1964). The defendants argue that the disclaimer, incorporated by reference in the plaintiff's complaint, makes this such a case.

In mounting this argument, the defendants distort the fraudulent misrepresentation. They insist **[**23]** that the plaintiff's asserted injury flows from a broken promise of accreditation (i.e., that he was promised accreditation that did not occur). Since the disclaimer flatly contradicts any such representation, the defendants say, reliance on that promise was objectively unreasonable.

This argument erects, and then attacks, a straw man. As said, the plaintiff's complaint alleges that the defendants falsely implied that SNESL had the capacity to achieve near-term accreditation. This is a meaningful distinction. It is one thing for an actor to demur when asked to guarantee a third party's actions. It is quite another for an actor to mislead a person into believing that the actor itself possesses means and abilities fully within its control. Given

this distinction, the defendants' reliance on the disclaimer is misplaced: inasmuch as the disclaimer does not cover the alleged misrepresentations, it cannot defeat them. See Hitachi Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 630-631 (4th Cir. 1999) (holding that HN15 a contracting party may recover for fraud notwithstanding "specific disclaimers that do not cover the allegedly fraudulent contract-inducing representations").

[24]** It is, of course, arguable that the proof at summary judgment or at trial may show that the disclaimer does cover whatever misrepresentations (if any) were actually made. But even if the defendants' characterization of the plaintiff's fraudulent misrepresentation claim was on the mark, we could not affirm the order of dismissal on this ground. We explain briefly.

HN16 Under Massachusetts law, "a party may not contract out of fraud." Turner v. Johnson & Johnson, 809 F.2d 90, 95 (1st Cir. 1986). With this in mind, Massachusetts courts consistently have held that disclaimers do not automatically defeat fraudulent misrepresentation claims. See, e.g., Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551, 558 (Mass. 1941); Sound Techniques, Inc. v. Hoffman, 50 Mass. App. Ct. 425, 737 N.E.2d 920, 924 (Mass. App. Ct. 2000); see also VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 642 N.E.2d 587, 594 n.11 (Mass. App. Ct. 1994) (collecting cases).

At the motion to dismiss stage, information such as the conspicuousness of the disclaimer and the

parties' discussions concerning it is largely undeveloped. These details **[**25]** are relevant, as the circumstances surrounding the formation of the contract will shed light upon the disclaimer's meaning and effect. See Turner, 809 F.2d at 96 (stating that when dealing with an ambiguous disclaimer, "the agreement is to some extent left undefined, and the plaintiff's understanding of the agreement logically may be colored by the defendant's prior statements, fraudulent or otherwise"). On an empty record, we would have no principled choice but to decline the defendants' invitation to hold, as a matter of law, that there is no possible set of circumstances under which the disclaimer might prove ineffective. See V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 418 (1st Cir. 1985) (cautioning against deciding whether an exculpatory clause precludes a misrepresentation claim "without development of a factual record").

5. Statute of Limitations. The defendants have a final fallback position. They assert that, even if the fraudulent misrepresentation claim is actionable, it is time-barred. We explore this possibility.

*HN17*To a limited extent, a statute of limitations defense can be considered on a Rule 12(b)(6) motion. See **[**26]** , e.g., LaChapelle, 142 F.3d at 509. The key is whether the complaint and any documents that properly may be read in conjunction with it show beyond doubt that the claim asserted is out of time. Id.

*HN18*Massachusetts law provides that an action in

tort -- of which fraudulent misrepresentation is a species -- "shall be commenced only within three years next after the cause of action accrues." Mass. Gen. Laws ch. 260, § 2A. A claim for fraudulent misrepresentation does not begin to accrue until "a plaintiff learns or reasonably should have learned of the misrepresentation." Kent v. Dupree, 13 Mass. App. Ct. 44, 429 N.E.2d 1041, 1043 (Mass. App. Ct. 1982); accord Patsos v. First Albany Corp., 433 Mass. 323, 741 N.E.2d 841, 846 (Mass. 2001); McEneaney, 650 N.E.2d at 97. In this context, courts sometimes ask when sufficient indicia of trouble -- storm warnings, so to speak -- should have been apparent to a reasonably prudent person. See, e.g., Wolinetz v. Berkshire Life Ins. Co., 361 F.3d 44, 47-48 (1st Cir. 2004); Young v. Lepone, 305 F.3d 1, 8 (1st Cir. 2002). **[**27]**

In the case at hand, the plaintiff's complaint alleges that he learned of persistent deficiencies precluding ABA accreditation at an unspecified date in November of 1999. There are no facts alleged in the complaint that require an inference of an earlier accrual date. As of that time, then, the plaintiff should have figured out that the defendants' rodomontade about the school's capabilities and the imminence of accreditation was quite likely pie in the sky. On that basis, the plaintiff should have commenced his action no later than November of 2002 (the precise date is inconsequential, for reasons that shortly will become apparent). Because this action was not docketed until June 9, 2003, a cursory glance would appear to validate the defendants' assertion that the statute **[*18]** of limitations had

run. See, e.g., Jolicoeur v. S. New Eng. Sch. of Law, 104 Fed. Appx. 745, 746-47 (1st Cir. 2004) (per curiam) (holding a similar action, filed by one of the plaintiff's classmates on June 18, 2003, to be time-barred).

Appearances sometimes are deceiving -- and this is such an instance. Here, unlike in Jolicoeur, the plaintiff filed an antecedent suit in the District **[**28]** of New Jersey on July 18, 2002 -- well within the putative limitations period. Although that case was dismissed on April 10, 2003, the dismissal was not on the merits, but, rather, for want of personal jurisdiction over the named defendants (SNESL, Larkin, and Prentiss). Rodi, 255 F. Supp. 2d at 351.

This history is significant because, HN15 under Massachusetts law, if an action is duly commenced within the limitations period and then dismissed for "any matter of form," the plaintiff is entitled to "commence a new action for the same cause within one year after the dismissal." Mass. Gen. Laws ch. 260, § 32. The savings statute applies, inter alia, to an action originally filed and dismissed in a court of another state or in a federal district court. See Boutiette v. Dickinson, 54 Mass. App. Ct. 817, 768 N.E.2d 562, 563-64 (Mass. App. Ct. 2002); Liberace v. Conway, 31 Mass. App. Ct. 40, 574 N.E.2d 1010, 1012 (Mass. App. Ct. 1991).

We have no doubt that, for purposes of this savings statute, dismissals for want of personal jurisdiction are appropriately classified as dismissals arising out

of matters of form. **[**29]** Cf. Ciampa v. Beverly Airport Comm'n, 38 Mass. App. Ct. 974, 650 N.E.2d 816, 817 (Mass. App. Ct. 1995) (holding that "dismissal for bringing an action in the wrong court is 'a matter of form' within the meaning of § 32"). After all, as the Supreme Judicial Court of Massachusetts wrote almost two centuries ago in describing an earlier version of the law, the legislature enacted the savings statute to ensure that "where [a] plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process," the statute of limitations "shall not prevent him from doing so." Coffin v. Cottle, 33 Mass. (16 Pick.) 383, 386, 1835 Mass. LEXIS 19 (1835) (emphasis supplied). A dismissal for lack of personal jurisdiction is the paradigmatic example of a decision not on the merits that can be cured by new process in a different court. See Teva Pharms., USA, Inc. v. United States FDA, 337 U.S. App. D.C. 204, 182 F.3d 1003, 1008 (D.C. Cir. 1999).

That ends this aspect of the matter. This action and the earlier New Jersey action are sisters under the skin; they involve the same parties, the same events, the same nucleus **[**30]** of operative facts, and the same causes of action. By means of the savings statute, the plaintiff had one year from the dismissal of his timely New Jersey action -- until April 10, 2004 -- to file anew. He instituted the action sub judice on June 9, 2003. His fraudulent misrepresentation claim is therefore timely.

In an effort to blunt the force of the savings statute,

SNESL raises the red flag of waiver. It asserts that because the plaintiff first set forth the savings statute argument in his opposition to the defendants' motion to dismiss, he is not entitled to benefit from it. SNESL's flag-waving overlooks, however, that HN20[↑] a court asked to dismiss a complaint on statute of limitations grounds may examine not only the complaint but also such other documents as may appropriately be considered under Fed. R. Civ. P. 12(b)(6). See Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001).

Here, the facts that the plaintiff relies on to show the applicability of the savings statute (e.g., the date that he filed the original action, the nature of that action, the date it was dismissed, and the basis for **[*19]** the dismissal) are **[**31]** all susceptible to judicial notice. See Fed. R. Evid. 201. Those facts may, therefore, be considered in assessing the force of the limitations defense. See Colonial Mortg. Bankers, 324 F.3d at 15-16; see also Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir. 1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.").

SNESL's citation to Granahan v. Commonwealth, 19 Mass. App. Ct. 617, 476 N.E.2d 266 (Mass. App. Ct. 1985), does not alter this conclusion. HN21[↑] In a diversity case, procedure, unlike substance, is governed by federal law. See Correia, 354 F.3d at 53 ("Federal courts sitting in diversity apply state substantive law and federal procedural rules."). Under federal procedural precedents, there has been

no waiver: the plaintiff presented developed argumentation on the savings statute to the lower court, and thus preserved that issue for appellate review. [3] B & T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co., 382 F.3d 36, 40 (1st Cir. 2004).

FOOTNOTES

3 In all events, Granahan is materially distinguishable. Here, the plaintiff presented his savings statute argument to the nisi prius court. In contrast, Granahan formally raised his savings statute contention for the first time in the appellate court. In launching that effort, Granahan relied solely on appellate argumentation, not "pleadings, affidavits, or other documents presented to the motion judge." 476 N.E.2d at 268 n.5 . The Appeals Court refused to entertain the argument. Id. at 268 . So understood, Granahan represents nothing more than the Massachusetts equivalent of the federal courts' familiar raise-or-waive rule. See, e.g., Teamsters, Chauffeurs, Warehousemen & Helpers Union v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992) (warning that "legal theories not raised squarely in the lower court cannot be broached for the first time on appeal").

[32]** To say more on this issue would be supererogatory. At this stage of the game, the statute

of limitations affords no basis for dismissal of the plaintiff's fraudulent misrepresentation claim. [4]

FOOTNOTES

4 This holding depends, of course, on the plaintiff's allegation as to when he first learned of the persistent (and likely insuperable) deficiencies that precluded ABA accreditation. Should the proof on this point unfold differently, the district court is free to reexamine the date of accrual.

C. The Chapter 93A Claim.

The situation concerning the plaintiff's claim under the Massachusetts Consumer Protection Act is less clear-cut. HN22 Before bringing suit under that statute, a plaintiff must mail to the defendant a "written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon." Mass. Gen. Laws ch. 93A, § 9(3). This notification must be furnished no fewer than thirty days prior to the filing of suit. Id. The statutory **[**33]** notice requirement is not merely a procedural nicety, but, rather, "a prerequisite to suit." Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975). Furthermore, "as a special element" of the cause of action, it must be alleged in the plaintiff's complaint. Id.

In this instance, neither the plaintiff's complaint nor

the documents attached thereto mention any such notification. That is sufficient ground to justify dismissal of the Chapter 93A claim. See, e.g., City of Boston v. Aetna Life Ins. Co., 399 Mass. 569, 506 N.E.2d 106, 109 (Mass. 1987); Spilios v. Cohen, 38 Mass. App. Ct. 338, 647 N.E.2d 1218, 1220-21 (Mass. App. Ct. 1995); see also Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988) (explaining that, in order to survive a Rule 12(b)(6) motion, a complaint must "set forth factual allegations, either direct or inferential, respecting **[*20]** each material element necessary to sustain recovery under some actionable legal theory").

This ruling has no effect on the plaintiff's fraudulent misrepresentation claim. See York v. Sullivan, 369 Mass. 157, 338 N.E.2d 341, 346 (Mass. 1975) **[**34]** (explaining that HN23"the [notice] requirement is a prerequisite to an action under [Chapter 93A, § 9], but nothing in the statute makes it a prerequisite to any other remedy available to aggrieved consumers"). Moreover, it may represent no more than a temporary victory for the defendants. HN24A failure to allege compliance with the statutory notice requirement is not necessarily a death knell for a Chapter 93A claim. Massachusetts courts typically have allowed plaintiffs to amend in order to cure this kind of modest pleading defect. See, e.g., Jacobs v. Yamaha Motor Corp., 420 Mass. 323, 649 N.E.2d 758, 761 (Mass. 1995); Parker v. D'Avolio, 40 Mass. App. Ct. 394, 664 N.E.2d 858, 861 n.4 (Mass. App. Ct. 1996). Federal practice is no less permissive. See Fed. R. Civ. P. 15(a) (stating that leave to amend "shall be freely given when justice so requires").

Allowing an opportunity to amend is especially fitting here. Our reasons are fivefold. First, the plaintiff filed the complaint pro se, and HN25"courts [should] endeavor, within reasonable limits, to guard against the loss of pro se claims due to technical **[**35]** defects." Boivin, 225 F.3d at 43. Second, HN26a fraudulent misrepresentation, actionable at common law, often can form the basis for a Chapter 93A claim. See, e.g., Adams v. Liberty Mut. Ins. Co., 60 Mass. App. Ct. 55, 799 N.E.2d 130, 140 n.19 (Mass. App. Ct. 2003); Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 396 N.E.2d 149, 154 (Mass. App. Ct. 1979); see also VMark Software, 642 N.E.2d at 595 (collecting cases). So here: apart from the question of notice, the plaintiff's allegations of fraudulent misrepresentation state a colorable claim for relief under Chapter 93A. Third, the plaintiff vouchsafed in his opposition to the motion to dismiss, and now reaffirms, that he did in fact furnish the statutorily required notice. [5] Fourth, we do not know whether the district court even focused on this defect (as we have said, the district court did not state a particularized ground for dismissing this claim). Finally, the plaintiff, even without knowing the precise basis for the district court's order of dismissal, did seek leave to amend as part of his reconsideration request (an overture that the district **[**36]** court denied without any explanation).

FOOTNOTES

5 The plaintiff actually submitted the putative notice to the district court, and it is in the record on appeal. We take no view of its sufficiency vis-a-vis the statutory requirement.

The Supreme Court declared long ago that "the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). The view that the pleading of cases is a game in which every miscue should be fatal is antithetic to the spirit of the federal rules. Cf. Fed. R. Civ. P. 1 (explaining that the federal rules designed to achieve, inter alia, the "just" resolution of disputes). Each case is sui generis. Here, however, the circumstances cry out for affording the plaintiff a fair opportunity to replead his Chapter 93A claim. Accordingly, we direct the district court, on remand, to grant the plaintiff that opportunity.

III. CONCLUSION

We need go no further. For the reasons **[**37]** elaborated above, we reverse the district court's order insofar as it dismisses the fraudulent misrepresentation count. We affirm the order insofar as it dismisses the Chapter 93A count but direct that the plaintiff be afforded leave to amend that **[*21]** count. The portion of the order dismissing the other seven counts in the complaint has not been contested, and, accordingly, we leave that portion of the order intact.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Two-thirds costs shall be taxed in favor of the plaintiff.

No. 07-1770

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOSEPH RODI

Plaintiff - Appellant

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW;
FRANCIS J. LARKIN; DAVID M. PRENTISS

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF THE APPELLANT, JOSEPH RODI

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Date: July 2, 2007

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument should be heard in this case because Mr. Rodi wishes to highlight certain parts of the record orally before the Court. Mr. Rodi believes that oral argument would assist the Court in determining that summary judgment was improperly granted in favor of the defendants and that the Honorable Nancy Gertner, U.S.D.J. should have recused herself from the case and returned the case to the Clerk for reassignment pursuant to Local Rule 40.1(I) and (K).

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to adjudicate this appeal because one of the orders being appealed is a final order disposing of the whole underlying case, to

wit: the District Court Order of March 31, 2007 granting the Defendants' motion for summary judgment. See 28 U.S.C. § 1291. The notice of appeal was filed within ten (10) days thereafter, and as such it was timely filed. The District Court had subject matter jurisdiction over the underlying matter based on complete diversity of citizenship and over $75,000 in controversy.

II. STATEMENT OF THE ISSUES

1. Did the District Court (Gertner, J.) err in granting summary judgment in favor of the defendants because it necessarily resolved several important factual issues in favor of the moving party, it assumed facts not in evidence and made impermissible credibility decisions in favor of the moving party?

2. Did the District Court Judge (Hon. Nancy Gertner) improperly refuse to return the case to the Clerk for

reassignment pursuant to Local Rule 40.1(K) where the case had been remanded to the District Court by the Appeals Court prior to a responsive pleading being filed by the defendants, and where Judge Gertner had publicly expressed in a non-judicial forum an opinion which was related directly to the essential issues in the litigation and which was in favor of the defendants?

III. STATEMENT OF THE CASE

Appellant Joseph Rodi ("Rodi") submits this brief in support of his appeal of: (1) the grant by the District Court (Gertner, J.) of the defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56; and (2) the denial by the District Court of Rodi's motion for reassignment pursuant to L.R. 40.1(K)(2). As set forth below, Judge Gertner disregarded settled law at the summary judgment stage by resolving factual disputes in favor of the moving party in

violation of Fed. R. Civ. P 56, and Judge Gertner should have recused herself from this case *ab initio* and especially after remand from the Court of Appeals.

Rodi brought this suit against his former law school, the Southern New England School of Law ("SNESL"), and two of its former deans, Francis J. Larkin ("Larkin") and David M. Prentiss ("Prentiss"), alleging that the defendants had fraudulently misrepresented the school's prospects for accreditation by the American Bar Association. Rodi relied on these misrepresentations to his detriment by remaining at the school, by paying thousands of dollars in tuition, and by forgoing other opportunities. The school never obtained ABA

accreditation and thus Rodi, despite his degree, cannot sit for the bar in his home state of New Jersey. SNESL continues to flounder. As late as 2005 it was determined by the Massachusetts Board of Higher Education that SNESL will not succeed in achieving ABA accreditation within the next five years. Defendant Dean Prentiss, meanwhile, was terminated from SNESL in 2000 against his wishes, he left the practice of law and now works for a zoo.

This case was originally assigned to United States District Court Judge Nancy Gernter. Two other former SNESL students, Brian Tamborelli and Guilin Jolicouer, also sued the school arising out of the same substantial facts (see Jolicouer v. SNESL, 03-cv-11159 and Tamborelli v. SNESL, 03-cv-11305).

The keynote speaker at Rodi and Jolicouer's commencement from the law school in 2000 was Judge Gertner, at which Judge Gernter spoke in favor of SNESL's efforts to receive ABA accreditation. Further, Judge Gertner appeared on stage at SNESL during the presentment of the first SNESL "Advocacy in Scholarship Award" named after then Court TV anchor Rikki Klieman which was established to "boost the reputation of the unaccredited school."[1]

SNESL moved to have the Tamborelli and Jolicouer cases transferred to Judge Gertner and *did not disclose* the fact that Judge Gertner had

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[1] Living Section of the Boston Globe, Saturday, June 10, 2000.

delivered the commencement address. Judge Gertner accepted the transfer of the Jolicouer and Tamborelli cases and then promptly dismissed all three cases pursuant to Fed. R. Civ. P. 12(b)(6) without detailed explanation or written rulings. On October 27, 2003, immediately upon discovering the fact that Judge Gertner had delivered his commencement address[2], Jolicoeur moved for reconsideration and requested Judge Gertner's recusal pursuant to Local Rule 40.1(I) prior to ruling on the reconsideration motion, citing El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 n. 6 (1st Cir. 1994). See App. p. 1. Judge Gertner denied the motion. See Addendum, p. 1.

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[2] Upon information and belief, neither Rodi, Jolicouer nor Tamborelli attended graduation.

All three cases were appealed. The First Circuit reversed the District Court in the Rodi case on Rodi's fraudulent misrepresentation count, and directed that Rodi be afforded leave to amend his chapter 93A claim. See Rodi v. Southern New England School of Law, et al., 389 F.3d 5 (1st Cir. 2004). The Court of Appeals ruled in this case (in its decision dated 11/10/04) that Mr. Rodi's claim "passes [the] screen" for setting forth a claim for misrepresentation. Id. The dismissals of Jolicouer's and Tamborelli's cases were upheld on statute of limitations grounds, but otherwise, this Court held, "we would have had to remand the matter to the district court to complete its task". See Jolicoeur, 03-cv-11159.

Rodi timely filed an amended complaint. Plaintiff waited several months until the status conference in July, 2005 for Judge Gertner to remand the case to the Clerk for reassignment. Judge Gertner, however, failed to return the case to the clerk for reassignment as mandated by Local Rule 40.1(K). Thus, Rodi moved for reassignment less than one month after the status conference and one month after the undersigned filed a notice of appearance in the case. App. p. 1.

Local Rule 40.1(K)(2) states: "In all other cases in which the mandate of the appellate court requires further proceedings in this court, **such proceedings shall not be conducted before the judge before whom the prior proceedings were**

conducted unless the terms of the remand require that further proceedings be conducted before the original judge or unless the judge determines that there will result a substantial saving in the time of the whole court and that there is no reason why, in the interest of justice, further proceedings should be conducted before another judge." Local Rule 40.1(K)(2) (Emphasis added).

In his motion, Rodi argued that: (i) the terms of the remand in this case did not require that further proceedings be conducted before the original judge; and (ii) because no answer had been filed prior to dismissal, no discovery was conducted, no discovery responses had been served and no depositions had been noticed or taken, there would

be no saving in the time for the case to proceed before the original judge. App., p. 1.

Judge Gertner denied the motion on September 14, 2005, ruling:

> "I so find: This Court is familiar with the background and procedural history of the instant case. Moreover, plaintiff filed the instant motion eight months after the appellate decision, and after the July, 2005 status conference. To the extent that the reassignment rule is effectively a rule of disqualification, nothing about this Court's initial rule suggests a different result. This Court's initial decision was based on the claimed insufficiency of the complaint on its face, a conclusion with which the First Circuit disagreed. Clearly, in the light of this record, the plaintiff has a right to fully litigate the claim, to garner discovery, and to seek to prove the allegations."

See Addendum, p. 1 (Order of September 14, 2005). After discovery, Judge Gertner granted SNESL's motion for summary judgment, resolving

several important factual issues in the moving party's favor and making credibility decisions in favor of the moving party. Addendum, p. 2. This appeal ensues.

IV. STATEMENT OF FACTS

From August, 1997 through November, 1999 Dean Larkin and Dean Prentiss promised Mr. Rodi and his fellow students on several different occasions that the law school would be accredited by the American Bar Association ("ABA") prior to their graduation. See Appendix, p. 12 (Affidavit of Joseph Rodi). Mr. Rodi and at least several other students believed and relied upon these promises and stayed at SNESL. Rodi asserts that the deans' statements were unequivocal promises, not mere opinions. Five

of Mr. Rodi's former classmates support this contention. See Appendix, p. 3 - 11 (Affidavits of Guilin F. Jolicoeur, Brian Tamborelli, John Reilly, Joseph P. Costanza and Nicola Corea).

1. **Mr. Rodi enrolled at SNESL**

In March, 1997 Mr. Rodi applied for admission to SNESL. Mr. Rodi was a life-long New Jersey resident. Because graduates from law schools outside of New Jersey which are not accredited by the ABA are not permitted to sit for the New Jersey bar examination, it was of critical importance to Mr. Rodi that SNESL achieve ABA accreditation before he graduated. App. 12, para. 1.

In July, 1997 the Accreditation Committee of the ABA recommended that SNESL be granted so-

called "Provisional Accreditation". In order for the school to actually achieve such Provisional Accreditation (which would have enabled Mr. Rodi to sit for the New Jersey bar), the Accreditation Committee's recommendation had to be approved by ABA's Council of the Section of Legal Education and Admission to the Bar, and by the ABA House of Delegates.

In July of 1997, Mr. Rodi received a letter from Defendant Larkin stating that he was "highly confident" of gaining provisional ABA accreditation and that the future of the school "has never been brighter." App. p. 16. Based on Larkin's optimism regarding ABA accreditation, Rodi enrolled at

SNESL. (Rodi agrees that Larkin's optimism may have been justified prior to the ABA's denial.)

2. The First ABA Denial of Accreditation

Despite the Accreditation Committee's recommendation, the ABA denied SNESL's application for Provisional Accreditation. App. p. 17 - 20. On August 8, 1997 the ABA's Council of the Section of Legal Education and Admissions to the Bar (the "Council") wrote to SNESL and informed the SNESL that it was not in substantial compliance with Standard 102(a) and Interpretation 102-1 of the ABA accreditation standards[3] in the following four respects:

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[3] Standard 102(a) states: "A law school is granted provisional approval if it establishes that it substantially complies with each of the Standards and presents a reliable

(1) SNESL did not admit applicants who appear capable of satisfactorily completing the education program and being admitted to the bar (Standard 501(b));

(2) SNESL did not maintain sound standards of scholastic achievement, including clearly defined standards for good standing, advancement, and graduation (Standard 303(a));

(3) SNESL did not offer live-client or other real-life practice experiences through clinics or externship programs (Standard 302(c)); and

(4) SNESL's faculty did not possesses a "high degree of competence" as

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plan for bringing the law school into full compliance with the Standards within three years after receiving provisional approval." Interpretation 102-1 states: "Substantial compliance must be achieved as to each of the Standards. Substantial compliance with each Standard is measured at the time a law school seeks provisional approval. Plans for construction, financing, library improvement, and recruitment of faculty which are presented by a law school seeking provisional approval do not, in themselves, constitute evidence of substantial compliance."

demonstrated by its scholarly research and writing (Standard 401).

The Council also expressed "concern" regarding SNESL's compliance with the following standards:

(5) The requirement of Standard 403(a) that the major burden of the School's educational program rest upon the full-time faculty and the requirement of Standard 403(b) that full-time faculty provide students with substantially all of their instruction in the first two years of the part-time curriculum and a major portion of their total instruction.

(6) The requirements of Standard 505 concerning the admission of previously disqualified applicants.

(7) The potential conflict between the School's expressed intent to increase the size of its student body in order to generate additional revenue, and its obligation to secure the resources needed to sustain a sound program of legal education under Standard 201(a), and the relatively low academic credentials of the School's applicant pool.

See App. p. 17 - 20.

Mr. Larkin called a meeting of the students. App. p. 12, para. 3. At the meeting, Mr. Larkin promised that SNESL would reapply for Provisional Approval at its very next opportunity. Id. He gave repeated assurances to the students that the school had rectified the deficiencies identified by the ABA. Id. Mr. Larkin then unequivocally promised ABA accreditation. He stated: "The school will be accredited by the ABA the next time around, and before you graduate." Id. Soon thereafter, Defendant Prentice replaced Larkin as dean. Larkin was appointed as the school's Chancellor. App. p. 21 - 31 (Deposition of Francis Larkin, p. p. 70, ln. 1, p. 69 ln. 18). There is no evidence in the record that Dean

Prentice or anyone else at the school ever retracted Mr. Larkin's promises of accreditation.

Mr. Rodi contemplated leaving the school after his first year. Ex. 1. Dean Prentiss wrote a letter to Mr. Rodi dated July 27, 1998 to induce him to stay at SNESL. App. p. 32. The letter stated that there should be "no cause for pessimism" about the school's achievement of ABA accreditation. Id.

Between the first denial of accreditation in September, 1997 and the second denial of accreditation in November, 1999, Mr. Larkin and Mr. Prentiss both promised Mr. Rodi and the rest of the SNESL student body on numerous occasions and in numerous locations that they were certain of achieving ABA accreditation. App. p. 12. They also

said that if SNESL was denied accreditation it would appeal to the ABA's House of Delegates who could overturn any such adverse decision. See Exhibit 1. The evidence in the record is that these were promises, not mere "opinions". App. p. 12; Appendix, p. 3 - 11 (Affidavits of Guilin F. Jolicoeur, Brian Tamborelli, John Reilly, Joseph P. Costanza and Nicola Corea)

Based on Larkin and Prentiss' promises, Mr. Rodi decided to stay at SNESL. App. p. 12. While Mr. Rodi had applied to and been rejected by two New Jersey law schools to which he had applied to transfer, he still elected to stay at SNESL rather than pursue a Ph.D. as he had considered doing. Id. If Larkin and Prentiss had not promised

accreditation, Mr. Rodi would have left the school. Id.

3. Five of Mr. Rodi's classmates corroborate that Prentiss and Larkin made the above-referenced promises

Rodi submitted to the Court affidavits from five former students (Brian Tamborelli, Esq., John Reilly, Joseph Costanza, Esq., Nicola Corea, Esq. and Guilin Jolicouer), each of whom corroborate Mr. Rodi's claim that the defendants made the above-referenced promises. Appendix, p. 3 - 11. Brian Tamborelli, who is a practicing lawyer in both Massachusetts and Connecticut, stated in his affidavit (which was submitted to the Court):

> "I was a student at the Southern New England School of Law (hereinafter SNESL) during the years of 1998 through 2001... SNESL

> frustrated my attempt to examine the ABA documents relevant to the denial of the ABA application... At various forums between the years of 1998 through 1999, SNESL only emphasized the positive and **made assurances that the law school was in substantial compliance with each and every ABA Standard for the accreditation. . . On one memorable occasion, Dean Robert Ward declared that ABA accreditation "was in the bag".**

See App. p. 4 (Affidavit of Attorney Brian Tamborelli) (emphasis added).

Guilin Jolicouer, another of Mr. Rodi's classmates, stated:

> "From 1997 to 1999 both Mr. Prentiss and Larkin made constant promises of ABA accreditation to the student body. **It wasn't as though they were just hopeful, rather they were guaranteeing accreditation.** Larkin told us that he had been a member of the ABA for many years and **we believed him when he said that he knew it would happen** (i.e., that the school would be ABA accredited) before we graduated. Prentiss and

Larkin both said they knew exactly what the ABA wanted and they had fixed all the problems in their first application. There was no doubt in their minds, and so there was no doubt in mine. Their speeches regarding SNESL's becoming an ABA accredited law school were utmost persuasive and convincing."

See App. p. 3 (Affidavit of Attorney Guilin Jolicoeur) (emphasis added).

John Reilly stated:

"I entered Southern New England School of Law (hereinafter SNESL) in the Fall of 1997 as a full-time student. . . Southern New England School of Law and its representatives made **verbal assurances that SNESL would obtain accreditation**. At a forum on the law school's status of ABA accreditation during the month of September 1997, Francis Larkin stated that we were that close (gesturing with his index finger and thumb approximately one inch apart). Upon reapplication for ABA approval, in the fall of 1998, SNESL made verbal representations that the school was in substantial compliance

with ABA standards and **would obtain accreditation.**"

See App. p. 6 (Affidavit of John Reilly, para. 1-9) (emphasis added).

Similarly, Joseph Costanza stated:

"During the calendar years of 1998 and 1999, Southern New England School of law and its representatives made **numerous verbal assurances that SNESL would obtain accreditation before the calendar year of Spring, 1999**. Upon reapplication for ABA approval, in the fall of 1998, SNESL made numerous verbal representations that the school was in substantial compliance with ABA standards and **would obtain accreditation**. . . Although, SNESL had made numerous promises to the student body (e.g. should the ABA [deny] the Law School ABA accreditation, SNESL would immediately appeal directly to the ABA House of Delegates), such promises were breached without explanation. At the time these representations were made, I was without knowledge of the falsity of these representations, and in fact believed them to be true. In reliance upon these

representations I remained a student at SNESL."

See App. p. 8 (Affidavit of Joseph Costanza)

(emphasis added).

Similarly, Nicola Corea stated:

"SNESL made verbal representations that the school was in substantial compliance with ABA standards and ***would obtain accreditation***."

See App. p. 10 (Affidavit of Nicola Corea)

(emphasis added).

4. The Law School's Second Denial of Accreditation

In 1998, SNESL reapplied for Provisional Accreditation. On November 22, 1999, during Mr. Rodi's third academic year, the Accreditation Committee rejected SNESL's reapplication and *did not*

even recommend that it be granted provisional approval. App. p. 33 - 51. The Committee found that SNESL has not established that it was in substantial compliance with the ABA standards, and had not presented a reliable plan for bringing the school into full compliance with standards within three years. Id. The areas of non-compliance were: Standard 201 (resources for the program); Standard 303 (scholastic achievement and evaluation); Standard 501(b) (admission of students who do not appear capable of being admitted to the bar). See id. In a 17 page document entitled "Action of the Accreditation Committee" (Appendix at 33 - 51), the Committee found:

1) The bar passage rate of SNESL students dropped from 52% in the summer of 1998 to 31% in the summer of 1999. See p. 11.

2) The school's students had LSAT scores which were "average to below average". See p. 2.

3) Three out of four of the legal writing faculty were adjuncts, not full time professors. See p. 3.

4) There was a continual shortfall in admissions from academic years 1997-98 to 1998-99 to 1999-2000. The dean "concedes in his November, 1999 letter that even if provisional accreditation had been received by the School in August of 1999, the School would probably not have met its enrollment projections." See p. 8.

5) Because the school employs a "multitude" of computers made by different vendors, "some core applications software have not been implemented fully" and availability of training is "sometimes lacking." See p. 14.

6) The school ran over a half-million dollar operating loss for Fiscal Year 1998-99

due to "overspending" on adjunct fees, "underestimating" the start-up costs for a school clinic, "unexpected" costs at the school, "going over budget" on library expenditures, and the loss of 13 students. See p. 15

7) The school's original budget projections from 1999-2000 were "overly optimistic." Id. A certain SNESL professor agreed that the library budget increases for year 2000 "will not keep pace with inflation." See p. 16.

8) The school's financial projections for 1999-2000 were based on the "assumption that the School will receive provisional approval by the ABA." Id. at p. 15. The dean was questioned as to how "realistic" these projections were in view of the "dramatic decline" in first year enrollment experienced in 1999. See p. 16.

9) The director of the school's library made "significant cuts" in the library's 1999-2000 budget. See p. 13.

10) While the school cultivated a large number of placements in the public and

private sectors, "several placements have been terminated because of poor supervision", and "there was no formal training for supervisors and that faculty did not regularly conduct site visits." See p. 4.

11) Certain "skills courses were not taught on a consistent basis, including Appellate Litigation Clinic, Interviewing and Counseling, and ADR Practice." See p. 4.

12) While the school instituted an academic dismissal policy, the ABA found that: "Unfortunately, [the school] allowed some students who began their careers before the changes [to grading and dismissal rates] were implemented to remain even though their records were marginal." See p. 5. The dean later said that he intended "to take measures to make sure that this doesn't happen again." Id.

13) The school's bar assistance program was "not widely utilized." See p. 6.

14) There was only one non-Caucasian full time faculty member, and "the extra demands made upon her time to offer special counsel and assistances to African

American students could impinge upon her scholarly activity." See p. 6.

15) Approximately one-third of the students switched from full-time to part-time status in 1999, and the school lost 8 upper division students who transferred to ABA accredited schools. See p. 9.

16) There were approximately 50 elective courses found in the catalogue. However, only 12 were offered in Fall, 1998, 18 in Spring, 1999, and eight in Summer, 1999. See p. 2.

17) The school's office of career services had not developed an on-campus interviewing program. See p. 12; and

18) The site team expressed concern that the Director of Student Services was also the director of the school's Legal Writing Program. See p. 12.

See Appendix p. 33 - 51. After being denied provisional accreditation in 1999 when SNESL fell further short of ABA's accreditation standards over

the two year period, SNESL then *failed to appeal* to the ABA's House of Delegates in violation of its promises to the students. App. p. 12; App. p. 3 - 11. SNESL soon strayed *even* further from accreditation by releasing nearly half of its full-time faculty, effectively abandoning the near-term accreditation process. App. p. 12.[4]

5. **Despite their promises and extremely positive predictions, neither Dean Prentiss nor Dean Prentiss had any idea whether or not the ABA would grant accreditation**

A. Dean Prentiss: Dean Prentiss (who has since left the practice of law and now works for a zoo) testified at deposition that despite his promises he

[4] It is reasonable to infer that SNESL believed that any appeal would have been futile.

simply did not know whether the school would achieve accreditation. Prentiss testified that the ABA gave SNESL no guidelines as to the various accreditation standards. App. p. 52 - 66 (Deposition Trans. of David Prentiss), see pp. 118, ln. 20; p. 141, ln. 21; p. 144, ln. 19. "You don't know in advance. You don't know until they evaluate you and tell you whether they think [you are going to comply with the standard]." Id., p. 118-119. He testified that there are no set standards, benchmarks or guidelines promulgated by the ABA that a school can look at in trying to gauge whether or not it is going to be granted provisional accreditation, but he did know that SNESL was at the "low end of the spectrum". Id., p. 120, ln. 2; p. 191, ln. 3. Prentiss also testified

that Mr. Desidario (the school's ABA accreditation consultant) never gave the school a guarantee of accreditation, and none of the ABA representatives who visited the school said to the school that it would be granted accreditation. Id, p. 31, ln. 21; p. 72, ln. 1.

As to his letter to Mr. Rodi citing "no cause for pessimism" regarding the school's ABA chances, Prentiss testified at deposition: "I view pessimism at one end of the spectrum and optimism at the other end of the spectrum. I was trying to shoot for something in-between." Id., p. 80, ln. 8. When asked what the word "no" meant, Prentiss stated: "I'm not a linguist expert"; and "Go look in a dictionary. No means no." Ex. 13, p. 94, ln. 22; p. 35, line 19. He testified: "When I said I had thought there was no

cause for pessimism, I was trying to convey that people should have a balanced perspective on our chances." Id., p. 37, ln. 7; p. 80, ln. 2.

B. Dean Larkin: Mr. Larkin, similarly, admitted at deposition to not being sure regarding accreditation despite his promises:

> Q. Were you highly confident of the second application?
> A. After San Francisco in August of 1997 I was not highly confident of anything.
>
> App. p. 21, (Depo. Trans p. 106, ln. 7).
>
> Q. So did you learn any lessons the first time that you were going to apply the second time?
> A. Nothing comes to my mind.
> Q. How about the lesson that you never know what the ABA is going to do?
> A. I think this that is a fair statement.
>
> Id., p. 142, ln. 24 - 143, ln. 6.

V. SUMMARY OF THE ARGUMENT

Mr. Rodi's case should be reinstated on two bases:

(1) The District Court (Gertner, J.) made several important findings of fact in favor of the moving party at the summary judgment stage in violation of Fed. R. Civ. P. 56. The District Court made credibility determinations in favor of the moving party and failed to abide by the law of the case as ordered by this Court of Appeals.

(2) A judge who serves as the commencement speaker at a law school and who speaks in favor of that school's efforts at achieving ABA accreditation should not sit in judgment of a student who sues the school arising out of the

school's failed efforts in achieving such ABA accreditation, especially after the case is remanded from the Appeals Court and no answer had yet been filed by the defendants.

VI. ARGUMENT

1. THE DISTRICT COURT ERRED BY MAKING FINDINGS OF FACT IN THE MOVING PARTY'S FAVOR AT SUMMARY JUDGMENT

In granting the defendants' motion for summary judgment, Judge Gertner made findings of fact in the defendants' favor in contravention of Fed. R. Civ. P. 56, and made impermissible credibility determinations in favor of the defendants.

A motion for summary judgment must be denied where there exists a genuine issue of material fact. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

A genuine dispute exists if, based on the evidence, a reasonable jury *could* find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A. THE DISTRICT COURT ERRED BY FAILING TO ABIDE BY THE LAW OF THE CASE AS SET FORTH BY THIS COURT OF APPEALS

The essence of Rodi's appeal is this:

The law of this case, as determined by this Court on appeal from Judge Gertner's grant of the defendants' motion to dismiss, is that Mr. Rodi's causes of action for misrepresentation would survive and would be remanded to the District Court. See Rodi, 389 F.3d 5. This Court ruled: "Prentiss's statement that there was "no cause for pessimism"

about the prospect of near-term accreditation is materially false if there was in fact cause for pessimism due to the extent of the school's known shortcomings." Id., p. 12.

To be sure, Rodi was then obligated to discover facts which established that when the deans made their statements there was, in fact, cause for pessimism. *Rodi did just that: Rodi was successful in having both Prentiss and Larkin admit at deposition that they had no idea whatsoever whether SNESL would achieve short-term accreditation, and in fact there was cause for pessimism.*

The District Court erred because it ruled as a matter of law that even if a jury were presented with the following facts (which must be accepted as true at

the summary judgment stage) the jury could not find knowing misrepresentation on the part of the school:

(1) Prentiss knew when he made his statements that SNESL was at the "low end of the spectrum". App. p. 68, ln. 3;

(2) Prentiss knew that the ABA gave SNESL no guidelines as to the various accreditation standards. See App. p. 62, ln. 20; p. 65, ln. 21; p. 66, ln. 19;

(3) Prentiss knew: "You don't know in advance. You don't know until they evaluate you and tell you whether they think [you are going to comply with the standard]." App. p. 62, 63;

(4) Prentiss knew that there are no set standards, benchmarks or guidelines promulgated by

the ABA that a school can look at in trying to gauge whether or not it is going to be granted provisional accreditation (App. p. 66(D - E);

(5) Prentiss knew that none of the ABA representatives who visited the school said to the school that it would be granted accreditation. Id. p. 54, ln. 21; p. 58(B), ln. 1;

(6) Larkin, despite not being "highly confident of anything" in September, 1997 after the first ABA denial, told the students that there was "no cause for pessimism" regarding the school's accreditation chances at its next attempt because the school had rectified the deficiencies identified by the ABA (App. p. 29(C), ln. 7 - 10.)

(7) Larkin, at the same time, promised the students that the school would be accredited "the next time around and before you graduate" despite the fact that he had no idea what the ABA would do. See App. p. 12, Larkin depo trans. p. 30, ln. 24 - 31, ln. 6.

(8) Robert Desidario, the school's consultant regarding ABA accreditation, stated that Mr. Prentiss' statement to Mr. Rodi that there was "no cause for pessimism" was incorrect because there was, in fact, cause for pessimism; Mr. Prentiss' statement was an "overstatement"; Mr. Desidario was not shocked when the ABA delivered the law school its second denial of accreditation; Mr. Desidario never promised, hinted at, or otherwise

gave any indication to SNESL that it would be given accreditation; and SNESL never had a good development plan in place. See App. p. 80 - 81 (Affidavit of Jonathan Plaut).[5]

(N.B.: Rodi does not claim on appeal that Larkin's predictions of accreditation *prior* to the school's first denial of ABA accreditation in August, 1997 form the basis of his misrepresentation claim. Rather, the subsequent promises do.)

It is no secret why Dean Larkin and Dean Prentiss were attempting to keep Rodi and his classmates from leaving the school. An exodus of students after the first denial of accreditation would

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[5] SNESL moved to strike this Affidavit of Jonathan Plaut, however that motion was denied. See the Opinion submitted at the Addendum, p. 29 - 30.

mean less tuition revenue from the school and a decrease in the overall student body. Indeed, the ABA recognized this as an express area of concern in the school's first denial in 1997, namely that SNESL needed to retain students to maintain revenue.

Judge Gertner recites Rodi's allegation that in September, 1997:

> "Dean Larkin stated that there was 'no cause for pessimism regarding its receipt of accreditation in its next attempt.' According to plaintiff, Dean Larkin said that the school had been 'within an inch' of accreditation and that the school would be accredited by the ABA the next time around and before you graduate."

Op. p. 6-7. However, the District Court concluded: "[N]othing in the record contradicts Larkin's oral statements . . . at the time they were made." Id.

This is simply not true. Mr. Larkin admitted at deposition that after the San Francisco ABA meeting, *he was not confident of anything.* (App. p. 29(C), ln. 7 - 10) and that *nobody knows what the ABA is going to do.* See App. p. 12, Larkin depo trans. p. 30, ln. 24 - 31, ln. 6. Accordingly, the District Court made factual findings which were not in conformity with the evidence.

The District Court also disregarded the opinion of the plaintiff's expert, Dr. Leonard Krivy, Ph. D. Dr. Krivy is a consultant on higher education for over 35 years, and was hired by the plaintiff to review the documents in this case and provide an expert opinion regarding the school's likelihood of ABA accreditation. See App. p. 69 - 79. (The school moved to strike this

expert disclosure, but the motion was denied. See Op. p. 30.) After reviewing the ABA criteria for accreditation, SNESL's 1997 "Self-Study" and the two ABA Site Evaluations, Dr. Krivy concluded:

> "The ABA Standards for accreditation are comprehensive. The principal areas of concern are the administration and faculty, the program of legal education, the physical facilities, the library and information resources, the admissions process, student services, and finances. It is my view, based on my experience, noted previously, and by a review of the Southern New England School of Law's level of compliance with the ABA Standards for Approval of Law Schools, that near-term accreditation by the ABA would not occur."
>
> See App. p. 69 - 79.

B. A JURY COULD FIND THAT THE DEANS ENGAGED IN KNOWING MISREPRESENTATIONS BECAUSE THEY KNEW OF THE SCHOOL'S FURTHER DEPARTURE FROM ABA STANDARDS BETWEEN 1997 AND 1999

Not only was there no basis for the deans' promises of accreditation, but instead there was actual, tangible evidence which gave the deans reason to believe that accreditation would not occur: On the second application, the Accreditation Committee *did not even recommend that SNESL be granted provisional approval.* See App. p. 33 and cited the school's shortcomings in eighteen categories. The Committee found that SNESL had not established that it was in substantial compliance with each of the ABA standards, and had not presented a reliable plan for bringing the school into full compliance with standards within three years. App. p. 33.

Indeed, the District Court found: "There surely had been some deterioration at SNESL in 1999 with

respect to the areas that the ABA had expressed concern." Op., p. 9. Thus, even if the deans' statements were "opinions" and not "promises", there is no realistic way that Prentiss and Larkin could have reasonably believed their own opinions, because: (1) both deans were intimately familiar with the ABA accreditation standards; (2) they were both aware of major deficiencies at the school in at least 18 categories; and (3) the ABA had informed the school less than one year earlier in August, 1997 that it was not in substantial compliance with four of the ABA's accreditation standards and that the ABA had "urged" the school to pay attention to three additional areas. The fact that the school decided not

to appeal *either* adverse decision belies its confidence of accreditation.

The District Court states that the school placed ABA disclaimer language in the "student handbook" to which Rodi had "regular access". Op. p. 25, 27. This is not true. The disclaimer language is found in a prospective applicant catalogue which was not issued to Rodi after matriculation.

C. THE DISTRICT COURT MADE AN IMPERMISSIBLE CREDIBILITY DETERMINATION THAT RODI WAS NOT JUSTIFIED IN RELYING UPON THE DEANS' STATEMENTS

It is a factual question, not a legal question, whether Rodi and the other students' reliance on the deans' promises was reasonable. Rodi testified that he relied on those promises, including Larkin's

statements in September, 1997 that the school had rectified the areas of concern raised by the ABA. The District Court, however, ruled that Rodi's reliance on Dean Larkin's assurances of accreditation was "implausible" on its face, since SNESL had only learned of the ABA's concerns a month before. Order, p. 6.

It was not "implausible" that Rodi would trust his deans, and at best it is a factual question. Rodi had every reason to trust the deans of his school and to rely on their statements. Larkin had been a member of the ABA for over 45 years, and testified that he was "intimately familiar" with the procedures of the ABA. Ex. 5 (Larkin depo) App. p. 25, ln. 24. He was a member for many years in the ABA House of

Delegates, he was the Delegate of the Judicial Administration Division, and had been the National President of the American Law Students Association. Id., ln. 13, 20. Further, Larkin had served as a Massachusetts state court judge for 22 years and was, in his own words, "largely responsible" for getting SNESL its Massachusetts law school accreditation both as a teacher and as a member of the SNESL Board of Trustees. App. p. 22, ln. 8. If Dean Larkin's statements seem implausible in retrospect, they were certainly not implausible to Rodi and the five affiant students referenced above.[6]

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[6] Indeed, Larkin had familiarized himself "intimately" with the "very comprehensive volume of standards for every facet of the law school" published by the ABA. Ex. 5, p. 12, ln. 20; p. 13 ln. 1. For 20 years he edited the ABA's American Judges' Journal, which was the official publication of the Judicial

The District Court ascribes to Mr. Rodi far greater insight into the school's accreditation process than he actually had. The District Court suggests that Rodi should have known that the school disavowed Dean Larkin's statements because Larkin "was pushed out" as dean. Op. 8. There is no factual basis on which the District Court is justified in ascribing knowledge to Rodi as to the reasons why Larkin stepped down. The school never disavowed Larkin's promises of accreditation, and Larkin was appointed Chancellor of SNESL when he stepped down which commutes against the notion that the

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Administration. Id., p. 52, ln. 3. He was a member of the ABA's National Consortium of Justice and was on the Marshall Award Committee. Id., p. 68, ln. 20; p. 69, ln. 1.

school removed him from power and sought to disassociate itself from his promises of accreditation.

Under Massachusetts law, a claim for misrepresentation entails a false statement of material fact made to induce the plaintiff to act and reasonably relied upon by him to his detriment. Rodi, 389 F.3d 5, citing Zimmerman v. Kent, 575 N.E. 2d 70, 74 (Mass. App. Ct. 1991).[7] An opinion may be actionable misrepresentation if it may reasonable be understood by the listener "as implying the existence of facts" that justify the statement. See Rodi, p. 12, citing McEneaney v. Chestnut Hill Realty Corp., 650 N.E. 2d 93, 96 (Mass. App. Ct. 1995). An opinion is

[7] Sitting in diversity, this Court must look to the substantive law of the forum state (here, Massachusetts) to guide its analysis. Correia v. Fitzgerald, 354 F.3d 47, 53 (1st Cir. 2003).

actionable if it implies the existence of facts which are capable of being proven true or false. Levinsky Inc. v. Wal-Mart Stores Inc. 127 F.3d 122 (1st Cir. 1997.

For example, it is actionable misrepresentation for a car dealer to tell a buyer that he believes a car is in "good condition" when he knows it has significant mechanical defects. Briggs v. Carol Cars Inc, 553 N.E.2d 930 (Mass. 1990). Similarly, it is actionable misrepresentation for a corporation falsely to tell its investors that a specific project is a "great success" that is "proceeding smoothly and ... better than expected" in order to keep the investors from "pulling the plug". Stolzoff v.

Waste System Int'l Inc., 792 N.E.2d 1031 (Mass. App. Ct. 1990).

In other words, a speaker cannot hide behind the moniker of "opinion" if he knows he is not telling the truth. In this case, the law school was so far short of the ABA's objective standards for accreditation during its 1998-99 application that there is no realistic way for any such "opinion" to have honestly been believed by the speakers. Whether the defendants intentionally misrepresented the state of the school's accreditation is a jury question, and thus not ripe for summary judgment.

D. THE DISTRICT COURT MADE IMPROPER FACTUAL DETERMINATIONS AS TO THE STUDENTS' ABILITY TO LEARN THE TRUTH OF THE SCHOOL'S ABA ACCREDITATION CHANCES

The District Court made the impermissible factual determination that Rodi could have easily ascertained the veracity (or lack thereof) of the deans' representations of imminent accreditation because the ABA document denying accreditation was a "public document, available to all students." The Court states that Rodi "does not deny that the school's self report was attached to Dean Prentiss' 1998 letter" and that "everything was out in the open." Op., 20, 22.

The Court erred by making that factual determination. Rodi has repeatedly denied seeing any such report, and indeed the Court recognized that "neither party provided a copy of the report with the letter as part of the record." Op. 8 fn. 5. Indeed,

Larkin's statement that the report was available in the library was refuted both by Rodi and by Brian Tamborelli, who in his affidavit stated: "I was a student at the Southern New England School of Law (hereinafter SNESL) during the years of 1998 through 2001... SNESL frustrated my attempt to examine the ABA documents relevant to the denial of the ABA application." App. p. 4-5. Further, the school never stated that a "self report" was attached to a letter. The only self report in the record is approximately 100 pages and was certainly was not attached to the Prentiss letter. At no point in time was the report and data upon which "the report" was based ever available to Rodi or any students.

Accordingly, this issue is a factual dispute (indeed the report is not even part of the record) and thus it was improper for the Court to find that Rodi failed to take advantage of the resources available to him to ascertain the truth or falsity of the statements made to him.

Even more remarkable is that the District Court ruled that the phantom report *which the Court never read was accurate*: "It included a report accurately describing the school's current status with respect to accreditation." Op. 27, emphasis in original. It is not possible for the District Court, at the summary judgment stage, to rule on the accuracy of a report it has never seen and which the plaintiff denies exists.

In addition to relying on an "accurate" report which was never produced, the District Court applies a wholly unfair double standard to Mr. Rodi. The Court ascribes an affirmative duty on Rodi and the other students to discover the truth or falsity of the deans' promises and optimistic predictions about accreditation ("[Rodi does not deny that] "everything was out in the open" Op., 22; "Rodi, after all, was a law student. The report, its language, the data on which it was based, was entirely accessible to him". Id., p. 20). However, the Court is loathe to ascribe any duty on the school itself to temper its promises or extremely optimistic predictions ("There surely had been some deterioration at SNESL in 1999 with respect to the areas that the ABA had expressed

concern" (Op., p. 9), however "Prentiss [did not know] of 'disqualifying and probably irremediable deficiencies' at the time he made the statement." Op. 22; "Based on the November 1999 denial, the school's situation had deteriorated but nothing in the record remotely suggests that those problems were known to Prentiss in 1998." Op. p. 23.)

Thus, the District Court has in essence ruled that Larkin and Prentiss could not have known what they were saying was not true, but Rodi must have known it. Larkin and Prentiss are exonerated because they could not have known of the major school deficiencies only one year prior (despite the denial of accreditation and the seven points of concern as addressed by the ABA), yet Rodi is

charged with vetting the truth from his own deans' promises of accreditation despite his position that the school frustrated his attempts to discover that truth. This is simply not fair.

Under the controlling Massachusetts decisions followed in V.S.H. Realty, Inc., v. Texaco, Inc., 757 F.2d 411 (1st Cir. 1985), misleading fragmentary disclosures are actionable. Only SNESL and its deans -- not Rodi -- knew what SNESL had to do in order to obtain ABA accreditation. Rodi had no means to independently ascertain the truth of SNESL's assurances. Even if he could have somehow done so, under Massachusetts law a victim of fraud has no specific duty to ascertain the truth. Snyder v.

Sperry & Hutchinson Co., 368 Mass. 433, 446, 333 N.E.2d 421 (1975).

In fact, the duty to avoid misrepresentations is so strong that "the deceived party is not charged with failing to discover the truth." V.S.H. Realty, 757 F.2d at 415; see Snyder, 368 Mass. at 446. If a seller's representations are such as to induce a buyer not to undertake an independent examination of the pertinent facts, lulling him into placing confidence in the seller's assurances, the buyer's failure to investigate does not preclude recovery. This is especially true here, where it would have been difficult if not impossible for Rodi to learn the truth independently.

The fact that the statements referred to a future event does not render them unactionable "opinions". Under Massachusetts law, even if the statement at issue is viewed as a representation as to a future event, it still may be actionable if it involves a situation "where the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the misrepresentations relate." Williston on Contracts, sec. 1496, at 373-374 (3d ed. 1970); Goppen v. American Supply, 407 N.E. 2d 1255 (1979); Celluci v. Sun Oil Co., 2 Mass.App. 722, 730, 320 N.E.2d 919, 924 (1974), id., 368 Mass. 811, 331 N.E.2d 813 (1975).

Here, as deans of the school, Larkin and Prentiss were in a much better position than the students to know the facts underlying their promises and representations, insofar has they had intimate knowledge of the school's compliance (or lack thereof) with the ABA requirements and had substantial contact with the ABA in their role as heads of the school.

Further, the school frustrated Mr. Rodi and the other students' attempts to learn about the true status of SNESL's accreditation applications and the grounds for their denial. Mr. Rodi and other students requested information from the administration regarding the substance of the ABA's denial letters, and they also requested details

regarding SNESL's proposals to remedy the deficiencies, but these requests were all denied. See App. p. 14, para. 11. Tamborelli stated: "SNESL frustrated my attempt to examine the ABA documents relevant to the denial of the ABA application". App. p. 5, para. 7. "Fragmentary information may be as misleading . . . as active misrepresentation, and half-truths may be as actionable as whole lies. . . . ' See Harper & James, *Torts*, § 7.14. See also *Restatement: Torts*, § 529; Williston, Contracts (2d ed.) §§ 1497-1499." Kannavos v. Annino, 356 Mass. 42, 48, 247 N.E.2d 708 (1969); V.S.H. v. Texaco, 757 F.2d at 414-415; Bennett v. Trevecca Naz. Univ., M2004-01287-COA-

R3-CV (Tenn., 2006) (when party assumes to speak, it must do so truthfully).

E. LAW SCHOOL STUDENTS SHOULD BE PERMITTED TO RELY ON THE STATEMENTS AND PROMISES OF THEIR DEANS

Massachusetts takes a broad view of the fiduciary relationship. A fiduciary relationship may exist where one party reasonably reposes trust in another party with greater knowledge, expertise or control. See Patsos v. First Albany Corp., 433 Mass. 323, 741 N.E.2d 841 (2001) (broker-dealer who goes beyond mere execution of client's order is a fiduciary); Cleary v. Cleary, 427 Mass. 286, 692 N.E.2d 955 (1998) (insurance agent and attorney-in-fact who is designated a beneficiary during principal's last illness is a fiduciary); Demoulas v.

Demoulas Super Markets, Inc., 424 Mass. 501, 677 N.E.2d 159 (1997) (managing officers of closely held corporation are fiduciaries who cannot divert corporate profit opportunities to their own benefit). Massachusetts lawyers are fiduciaries even when not entrusted with client funds. See Berman v. Coakley, 243 Mass. 348, 354-355, 137 N.E. 667 (1923).

So, too, a law school dean does not deal with his students at arm's length. Whether or not a formally cognizable fiduciary relationship exists in this case, the trust a law school student reasonably reposes in his dean surely carries with it a higher duty of good faith, fair dealing and full disclosure than does the arm's length relationship between parties in business. See id.

F. THE DISTRICT COURT ERRED BY NOT CONSIDERING THE UNCONTROVERTED AFFIDAVITS OF FIVE OF RODI'S COLLEAGUES WHICH SUPPORT HIS CLAIM THAT THE SCHOOL PROMISED ACCREDITATION

The District Court ruled: "The students make vague allegations, suggesting that 'the school' made representations, without saying who the speaker was, or when or where the representations were made. . . [The statements] must not be considered as potentially actionable comments for lack of particularity." Op. at 7-8, 14.

Disregarding the students' affidavits at the summary judgment stage is improper. The affidavits are clear and specific, they provide a timeframe, they identify the speakers, and those speakers are people

for whom SNESL is legally responsible (to wit: the deans). In Jolicouer's affidavit, for example, he identifies the speakers, the subject matter of the representations, and the times of the representations. See App. p. 3. The speakers are unquestionably persons for which SNESL is legally responsible.

G. THE SCHOOL'S DECISION NOT TO APPEAL FURTHER BELIES ITS ASSERTION THAT IT BELIEVED IT WAS IN SUBSTANTIAL COMPLIANCE WITH ALL ABA ACCREDITATION STANDARDS

The ABA rejected SNESL's second application late in 1999. Defendants did not appeal this second rejection to the ABA House of Delegates as they promised they would. Even if Rodi might not personally have benefited from the appeal (due to his

imminent graduation) SNESL's failure to appeal is further evidence of its awareness of its inability to close the accreditation gap as well as evidence contrary to its long-asserted "opinion" that it was "within an inch" of provisional accreditation.

H. SNESL IS LIABLE FOR THE MISREPRESENTATIONS OF LARKIN, PRENTISS, DEAN HILLINGER AND THE PROFESSORS

The Court of Appeals has already ruled that SNESL is liable for the fraudulent misrepresentations of its deans under the theory of *respondeat superior* because they were high-ranking employees of SNESL acting within the scope of their employment. See Rodi, U.S.C.A. No. 03-2502, citing

Kavanagh v. Trs. of Boston Univ., 795 N.E. 2d 1170, 1174 (Mass. 2003).

It is reversible error, therefore, for the District Court to rule that the statements of Dean Hillinger and Director of Admissions Hebert are not attributable to the school under the doctrine of *respondeat superior*, or "not attributable to anyone for whom SNESL is legally responsible". Op., p. 7-8. The correct legal standard entails a two-step analysis. First, on summary judgment, "Supporting and opposing affidavits ... shall set forth such facts as would be admissible in evidence..." Since the key is admissibility, one must look to the Rules of Evidence and not to the doctrine of *respondeat superior*. Second, the statements of all SNESL deans and

directors regarding accreditation prospects would be admissible under F.R.E. 801(d)(2)(A, B, C and D) regarding hearsay exceptions for admissions by a party-opponent. The case cited by the Court, Veranda Beach Club, 936 F.2d at 1377, supports this view (third parties who detrimentally rely on an agent's unauthorized representations may hold the principal to the consequences of such reliance).

The District Court errs by not crediting the specificity of Rodi's allegation as to the statements made by Dean Hillinger. The Court found: "Rodi's vague allegation that someone at the school made statements from 1997 to 1999 promising to appeal is not actionable." Op. p. 14.

However, Rodi was very clear about this at deposition:

> Q. Who had promised that the second application would be appealed to the house of delegates if it were denied?
> A. That was Assistant Dean Hillinger.
> Q. When did Assistant Dean Hillinger say that the decision would be appealed if it were a denial?
> A. He said that in a bankruptcy class I had attended with him.
> Q. What did he say?
> A. He said that we will appeal a decision. We are going to be accredited. We are so confident that we will appeal to the ABA house of delegates to have the decision overturned.

App. p. 84, ln 15 - 24 (Depo. Trans. of Joseph Rodi).

The District Court found that Rodi "does not appear to dispute" that promises of accreditation made by Professors Pauley and Rudko cannot be

used against SNESL. Op., p. 16. This is completely untrue. Rodi make clear allegations in his Amended Complaint that Professors Pauley and Rudko both promised accreditation in their classes, which was knowingly false. See Amended Complaint. Id., para. 23, 24 and 25.[8]

I. CAUSATION

It is true that Mr. Rodi failed the Connecticut and Massachusetts bars five times combined. However, the Court makes an impermissible leap at the summary judgment stage that Rodi most likely

[8] At the time Professor Rudko made her remarks in Evidence class regarding in which state the students intended to practice law upon graduation, Massachusetts was the only state in which a graduate could sit for the bar without having graduated from an ABA accredited school. Connecticut did not become available until 2000.

would not have been able to pass the New Jersey bar either. This argument should not prevail because the bar exams for the three states are different tests. The testing authorities are different, the test questions are different (except for the multi-state portion), and of course the laws are different. For example, the MBE is only worth 35% in the New Jersey bar examination, while it is worth 50% in Massachusetts and Connecticut. See App. at 14-15. There is a portion of the test which requires analysis of a specific New Jersey statute. Id. It will never be known whether Mr. Rodi would have passed the New Jersey bar.[9] It is certainly not the purview of SNESL

[9] SNESL claims that Mr. Rodi was not harmed by any misrepresentation because he could move his family to Massachusetts and practice law here. That argument is valid

to speculate what might have happened if its false promises had been true.[10]

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only if the Court finds as a matter of law that a person cannot have legally cognizable harm by being forced to move in order to practice his/her profession. Mr. Rodi is a lifelong resident of New Jersey, and he does not want to uproot his wife and children from their home. App. p. 12. To analogize, if hypothetically an established physician in Boston were told that she could continue to practice medicine but she only if she moved out of state to do so, one can imagine that she would protest. Further, Mr. Rodi had a job offer as a lawyer in New Jersey. See p. 15. Even if the defendants' argument were credited, Mr. Rodi would at least be entitled to the damages arising from the relocation to Massachusetts, and the lost opportunity costs while engaged in a job search process. He had a job offer in New Jersey, but not elsewhere. Id.

[10] SNESL attempts to embarrass Mr. Rodi before this Court by saying that he graduated "near the bottom" of his class, he was "rejected" by both New Jersey law schools, he has "record of low academic achievement" and that "failed" a course in his final semester. The immutable fact, however, are that he was good enough for SNESL when they wanted his tuition money and that he was good enough for SNESL to graduate him. (Student tuition was the school's biggest source of revenue. See Prentiss Depo. trans., App. p. 68(C), ln. 5.)

Further, even if it took Mr. Rodi several tries to pass the bar exam in New Jersey he would have expended that effort, and this assertion cannot be gainsaid at the summary judgment stage. App. 14-15. Defendants' reliance on Sparks v. Fidelity Nat. Title Ins. Co., 294 F.3d 259 (1st Cir. 2002) is misplaced. In Sparks, the plaintiff had an *opportunity* to sell the lots in the subdivision, which he was unable to do and therefore suffered no harm by the defendant's misrepresentation. Here, in contrast, Mr. Rodi has not had an opportunity sit for the New Jersey bar exam.

SNESL next argues that even if Rodi had left the school and pursued a Ph.D., that would have had an "uncertain payoff". The financial uncertainty,

however, is the subject for a damages hearing, not a reason to grant summary judgment for the defendants. Further, Rodi had a job offer from the New Jersey Office of the Public Defender which was contingent on his passing the New Jersey Bar Exam. See App. p. 14 - 15; see also App. p. 86 - 88 (Affidavit of Peter A. Garcia, Esq.)

II. JUDGE GERTNER SHOULD NOT HAVE SAT IN JUDGMENT ON THIS CASE

A judge should recuse herself where there is an appearance of impropriety, even if no such impropriety actually exists. Constitutional due process requires that every litigant have a fair trial before an impartial judge. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 821-823, 106 S. Ct. 1580

(1986); Commonwealth Coatings Corp. v. Continental Cas. Co., 383 U.S. 156, 148, 89 S.Ct. 337 (1968) (impartiality and appearance of impartiality are the *sine qua non* of the legal system; the court must be unbiased and avoid appearance of bias).

A federal judge is subject to disqualification in any proceeding in which his or her impartiality might reasonably be questioned. See Moore's Federal Practice, § 63.20[1] (2003 ed.); 28 U.S.C. § 144; 28 U.S.C. § 455(b)(1). This is such a case.

Judge Gertner should have recused herself from presiding over this case, not only because she had publicly spoken on behalf of SNESL and in favor of its receiving ABA accreditation (the very institution and the very issue at the heart of this

case) and therefore exhibited a favorable viewpoint toward the sole institutional party in this case, but also because there is a very strong appearance of impropriety in her refusing to recuse herself even if no actual bias exists. The most common basis for disqualification of a judge is the appearance -- not the actual existence -- of partiality. See Moore's Federal Practice, § 63.03[3] (2003 ed.).

The statutory requirement that a judge whose impartiality is questionable must disqualify herself is designed to promote public confidence in the judicial process, not merely the actual impartiality of the judging. The integrity of the judiciary is the paramount concern of this requirement, which is as much a protection for the public at large as it is for

the individual litigants affected. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860, 108 S. Ct. 2194 (1988) (purpose of 28 U.S.C. § 455(a) is to promote public confidence in integrity of judicial process).

Judge Gertner cannot maintain an appearance of impartiality in the SNESL cases insofar as she was a graduation speaker for SNESL, she supported SNESL's accreditation in an off-the-bench public comment, she accepted an award from SNESL, and she then dismissed three ex-students' claims against SNESL arising out of such accreditation. Further, the Court of Appeals reinstated one claim, and suggested it would have done the same in at least the Jolicoeur case but for that plaintiff's failure to meet

the statute of limitations. See Jolicoeur, 03-cv-11159.

The grounds for disqualifying a judge whose impartiality is in question must be evaluated objectively. The standard for recusal is whether a reasonable person, with knowledge and understanding of all the relevant facts, would conclude that the judge's impartiality might reasonably be questioned. El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 (1st Cir. 1994); Liteky v. U.S.; O'Connor v. State of Nevada, 27 F.3d 357, 364 (9th Cir. 1994). Thus, the recusal statutes require not only that the judge be subjectively confident of his or her ability to be evenhanded, but also that an objective observer would not doubt the

judge's impartiality. In re Bernard v. Coyne, 31 F.3d 842, 844 (9th Cir. 1994). See United States v. Torkington, 874 F.2d 1441, 1447 (11th Cir. 1989) (reassignment is appropriate to preserve not only the reality but the appearance of proper function of judiciary as neutral, impartial administrator of justice); Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (in close cases, the balance "tips" in favor of recusal); United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987) (benefit of doubt to be given in favor of recusal).

"Judges, who are intimately involved in the judicial system and who are reluctant to impugn their own standards or cast aspersions on their colleagues, should keep in mind that outside

observers who have not served on the bench are more likely to have suspicions and doubts and are less likely to credit judges' impartiality than are judges themselves." *Moore's Federal Practice* at § 63, citing U.S. v. Jordan, 49 F.3d 152, 156-157 (5th Cir. 1995); Liljeberg, 486 U.S. at 1988 (while federal judge busy with the case may forget about personal concerns in it, outside observers are often more likely to cast doubt on judges' partiality).

Even if this Court determines that Judge Gertner need not have recused herself *ab initio*, Judge Gertner certainly should not have adjudicated this case upon remand. Rather, she should have return the case to the Clerk for reassignment as mandated by Local Rule 40.1(K). In this case, the

terms of the remand did not require that further proceedings be conducted before the original judge, and because no answer had been filed prior to dismissal, no discovery was conducted, no discovery responses had been served and no depositions had been noticed or taken, the case was for all practical purposes brand new and there would be no saving in the time for the case to proceed before the original judge.

An order denying a motion to recuse is fully reviewable on appeal from a final judgment. In re: Cargill, Inc., 66 F.3d 1256, 1260-61 (1st Cir. 1995). This Court has the power to remand this case and require further proceedings presided over by a different judge. See Liteky v. United States, 510

U.S. 540, 548-549, 114 S. Ct. 1147, 1154 (1994) (appellate authority has power to reassign case on remand and to require further proceedings as justice requires). This Court should exercise that power here.

Both of these issues should be decided on an abuse of discretion standard.

CONCLUSION

For the reasons set forth above, genuine issues of material fact are in controversy in this case and as such summary judgment should not have been granted. A jury certainly could return a plaintiff's verdict in this case. Mr. Rodi requests that this Court vacate the order of the District Court granting the defendants' motion for summary judgment and

remand the case with an instruction that the Clerk of the District Court reassign the case to a judge other than Judge Gertner. Mr. Rodi further requests his costs and fees and any further and additional relief this Court deems just.

Respectfully submitted,

JOSEPH RODI

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Date: July 2, 2007

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007 I caused a copy of the foregoing to be hand delivered to counsel for Appellees, Attorneys Allen L. David, Esq. and Elizabeth A. Houlding, Esq., Peabody & Arnold, LLP, 30 Rowes Wharf, Boston, MA 02110.

_____

Jonathan D. Plaut

TYPEFACE/ LENGTH LIMIT CERTIFICATE OF COMPLIANCE

Pursuant to Loc. R. 32 (a) (7), I hereby certify that the typeface of this brief is Times New Roman 14 point font, the word count is approximately 11,076 words, and that I have complied with all applicable rules governing the filing of this brief.

_____

Jonathan D. Plaut

No. 07-1770

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOSEPH RODI

Plaintiff - Appellant

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW;
FRANCIS J. LARKIN; DAVID M. PRENTISS

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
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ADDENDUM

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APPENDIX

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